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HOUSE BILL 311

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Jeannette O. Wallace

FOR THE LEGISLATIVE FINANCE COMMITTEE

AN ACT

RELATING TO MINING; REVISING APPEAL PROVISIONS OF THE SURFACE
MINING ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 69-25A-18 NMSA 1978 (being Laws 1979,
Chapter 291, Section 18) is amended to read:

"69-25A-18. DECISIONS OF DIRECTOR AND APPEALS.--

A. If an informal conference has been held pursuant
to Section [~~17 of the Surface Mining Act~~] 69-25A-17 NMSA 1978,
the director, after receiving the recommendation of the hearing
officer, shall issue and furnish the applicant for a permit and
persons who are parties to the administrative proceedings with
the written finding of the director, granting or denying the
permit in whole or in part and stating the reasons therefor,
within sixty days of the informal conference.

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1 B. If there has been no informal conference held
2 pursuant to Section [~~17 of the Surface Mining Act~~] 69-25A-17
3 NMSA 1978, the director shall notify the applicant for a permit
4 within ninety days of the last publication required by
5 Subsection A of Section [~~17 of that act~~] 69-25A-17 NMSA 1978,
6 whether the application has been approved or disapproved in
7 whole or in part. Upon good cause shown, the time may be
8 extended an additional ninety days.

9 C. If the application is approved, the permit shall
10 be issued. If the application is disapproved, specific reasons
11 [~~therefor must~~] for the disapproval shall be set forth in the
12 notification. Within thirty days after the applicant is
13 notified of the final decision of the director on the permit
14 application, the applicant or any person, with an interest
15 [~~which~~] that is or may be adversely affected, may request a
16 hearing on the reasons for the final determination. The
17 director shall hold a hearing within thirty days of [~~such~~] the
18 request and provide notification to all interested parties at
19 the time that the applicant is [~~so~~] notified. [~~Such~~] The
20 hearing shall be of record, adjudicatory in nature, and [~~no~~] a
21 person who presided at a conference under Section [~~17 of the~~
22 Surface Mining Act] 69-25A-17 NMSA 1978 shall [~~either~~] not
23 preside at the hearing or participate in the decision [~~thereon~~]
24 or in any administrative appeal [~~therefrom~~] from the decision.
25 Within thirty days after the hearing, the director shall issue

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1 and furnish the applicant, and all persons who participated in
2 the hearing, with the written decision of the director granting
3 or denying the permit in whole or in part and stating the
4 reasons therefor.

5 D. Where a hearing is requested pursuant to
6 Subsection C of this section, the director may, under such
7 conditions as [~~he~~] the director may prescribe, grant such
8 temporary relief as [~~he~~] the director deems appropriate pending
9 final determination of the proceeding if:

10 (1) all parties to the proceeding have been
11 notified and given an opportunity to be heard on a request for
12 temporary relief;

13 (2) the person requesting such relief shows that
14 there is a substantial likelihood that [~~he~~] the person will
15 prevail on the merits of the final determination of the
16 proceeding; and

17 (3) [~~such~~] the relief will not adversely affect
18 the public health or safety or cause significant imminent
19 environmental harm to land, air or water resources.

20 E. For the purpose of [~~such~~] the hearing, the
21 director may administer oaths, subpoena witnesses or written or
22 printed materials, compel attendance of the witnesses or
23 production of the materials and take evidence, including but
24 not limited to site inspections of the land to be affected and
25 other surface coal mining operations carried on by the

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1 applicant in the general vicinity of the proposed operation. A
2 verbatim record of each public hearing required by the Surface
3 Mining Act shall be made and a transcript made available on the
4 motion of any party or by order of the director.

5 F. Any applicant or any person with an interest
6 [~~which~~] that is or may be adversely affected, who has
7 participated in the administrative proceedings as an objector
8 and who is aggrieved by the decision of the director or the
9 director's failure to act within the time limits specified in
10 the Surface Mining Act [~~shall have~~] has the right to seek
11 [~~administrative~~] judicial review in accordance with [~~Subsection~~
12 ~~6 of~~] Section [~~29 of that act~~] 69-25A-30 NMSA 1978."

13 Section 2. Section 69-25A-29 NMSA 1978 (being Laws 1979,
14 Chapter 291, Section 29) is amended to read:

15 "69-25A-29. ADMINISTRATIVE REVIEW.--

16 A. A permittee issued a notice or order by the
17 director pursuant to the provisions of Section [~~25 of the~~
18 ~~Surface Mining Act~~] 69-25A-25 NMSA 1978, or any person having
19 an interest [~~which~~] that is or may be adversely affected by
20 [~~such~~] the notice or order or by any modification, vacation or
21 termination of [~~such~~] the notice or order, may apply to the
22 director for review of the notice or order within thirty days
23 of receipt thereof or within thirty days of its modification,
24 vacation or termination. Upon receipt of [~~such~~] the
25 application, the director shall cause such investigation to be

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1 made as ~~[he]~~ the director deems appropriate. ~~[Such]~~ The
2 investigation shall provide an opportunity for a public
3 hearing, at the request of the permittee or the person having
4 an interest ~~[which]~~ that is or may be adversely affected, to
5 enable the permittee or ~~[such]~~ the person to present
6 information relating to the issuance and continuance of ~~[such]~~
7 the notice or order or the modification, vacation or
8 termination ~~[thereof]~~ of the notice or order. The filing of an
9 application for review under this subsection shall not operate
10 as a stay of any order or notice.

11 B. The permittee and other interested persons shall
12 be given written notice of the time and place of the hearing at
13 least five days prior ~~[thereto]~~ to the hearing. Any ~~[such]~~
14 hearing shall be of record and adjudicatory in nature in
15 accordance with the commission's ~~[regulations]~~ rules.

16 C. Upon receiving the report of ~~[such]~~ the
17 investigation, the director shall make findings of fact and
18 shall issue a written decision, incorporating ~~[therein]~~ an
19 order vacating, affirming, modifying or terminating the notice
20 or order or the modification, vacation or termination of ~~[such]~~
21 the notice or order complained of and incorporate ~~[his]~~ the
22 director's findings ~~[therein]~~ in the decision. Where the
23 application for review concerns an order for cessation of
24 surface coal mining and reclamation operations issued pursuant
25 to the provisions of Section ~~[25 of the Surface Mining Act]~~ 69-

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1 25A-25 NMSA 1978, the director shall issue the written decision
2 within thirty days of the receipt of the application for
3 review, unless temporary relief has been granted by the
4 director pursuant to Subsection D of this section or by the
5 court pursuant to Section [~~30 of that act~~] 69-25A-30 NMSA 1978.

6 D. Pending completion of the investigation and
7 hearing required by this section, the applicant may file with
8 the director a written request that the director grant
9 temporary relief from any notice or order issued under Section
10 [~~25 of the Surface Mining Act~~] 69-25A-25 NMSA 1978, together
11 with a detailed statement giving reasons for granting [~~such~~]
12 the relief. The director shall issue an order or decision
13 granting or denying [~~such~~] the relief expeditiously. [~~Provided~~
14 ~~that where~~] If the applicant requests relief from an order for
15 cessation of coal mining and reclamation operations issued
16 pursuant to Section [~~25 of that act~~] 69-25A-25 NMSA 1978, the
17 order or decision on [~~such a~~] the request shall be issued
18 within five days of its receipt. The director may grant [~~such~~]
19 the relief, under such conditions as [~~he~~] the director may
20 prescribe, if:

21 (1) a hearing has been held in the locality of
22 the permit area on the request for temporary relief in which
23 all parties were given an opportunity to be heard;

24 (2) the applicant shows that there is
25 substantial likelihood that the findings of the director will

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1 be favorable to ~~[him]~~ the applicant; and

2 (3) ~~[such]~~ the relief will not adversely affect
3 the health or safety of the public or cause significant
4 imminent environmental harm to land, air or water resources.

5 E. Following the issuance of an order to show cause
6 as to why a permit should not be suspended or revoked pursuant
7 to Section ~~[25 of the Surface Mining Act]~~ 69-25A-25 NMSA 1978,
8 the director shall hold a public hearing after giving written
9 notice of the time, place and date ~~[thereof]~~ of the hearing.

10 Any ~~[such]~~ hearing shall be of record and adjudicatory in
11 nature in accordance with the commission's ~~[regulations]~~ rules.

12 Within sixty days following the public hearing, the director
13 shall issue and furnish to the permittee and all other parties
14 to the hearing a written decision, and the reasons ~~[therefor]~~
15 for the decision, concerning suspension or revocation of the
16 permit. If the director revokes the permit, the permittee
17 shall immediately cease surface coal mining operations on the
18 permit area and ~~[shall]~~ complete reclamation within a period
19 specified by the director, or the director shall declare as
20 forfeited the performance bonds for the operation. Any order
21 issued pursuant to this subsection shall be appealable directly
22 to the ~~[commission]~~ court pursuant to ~~[Subsection G of this]~~
23 Section 69-25A-30 NMSA 1978 without further review by the
24 director.

25 F. Whenever an order is issued under this section or

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1 as a result of any administrative proceeding under the Surface
2 Mining Act, at the request of any person a sum equal to the
3 aggregate amount of all costs and expenses, including attorney
4 fees, as determined by the director [~~or the commission~~] to have
5 been reasonably incurred by [~~such~~] the person for or in
6 connection with [~~his~~] the person's participation in [~~such~~] the
7 proceedings, including any judicial review of agency actions,
8 may be assessed against either party as the director [~~the~~
9 ~~commission~~] or the court deems proper [~~provided that no such~~
10 ~~assessment shall be imposed upon the director or commission.~~

11 G. ~~Any person who is aggrieved by a decision of the~~
12 ~~director may appeal to the commission for relief. In order to~~
13 ~~perfect such appeal, a notice of appeal must be filed with the~~
14 ~~commission and the director within thirty days of the~~
15 ~~director's decision. A hearing limited to the record compiled~~
16 ~~before the director shall be conducted by the commission in~~
17 ~~accordance with commission regulations. The commission shall~~
18 ~~consider and weigh all of the evidence contained in the record~~
19 ~~and shall make independent findings upon which to base its~~
20 ~~decision. The commission shall not be bound by findings of the~~
21 ~~director, notwithstanding such findings may be supported in the~~
22 ~~record by substantial evidence. If, before the date set for~~
23 ~~hearing, application is made to the commission for leave to~~
24 ~~present additional evidence and it is shown to the satisfaction~~
25 ~~of the commission that the additional evidence is material and~~

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1 ~~that there was good reason for failure to present it in the~~
2 ~~initial proceeding, the commission may order that the~~
3 ~~additional evidence be taken by the director. The director may~~
4 ~~modify his findings and decision by reason of the additional~~
5 ~~evidence and shall file with the commission a transcript of the~~
6 ~~additional evidence, together with any modified or new findings~~
7 ~~or decision]."~~

8 Section 3. Section 69-25A-30 NMSA 1978 (being Laws 1979,
9 Chapter 291, Section 30, as amended) is amended to read:

10 "69-25A-30. JUDICIAL REVIEW.--

11 A. ~~[Any]~~ A party to a proceeding before the
12 ~~[commission]~~ director who is aggrieved by a decision of the
13 ~~[commission]~~ director issued after a hearing may obtain a
14 review of that decision, other than a promulgation of a
15 ~~[regulation]~~ rule, by appeal to the district court pursuant to
16 the provisions of Section 39-3-1.1 NMSA 1978.

17 B. ~~[Any]~~ A person who is or may be aggrieved by any
18 ~~[regulation]~~ rule, or any amendment or repeal of a ~~[regulation]~~
19 rule, adopted by the commission may appeal to the court of
20 appeals for relief. All appeals shall be based upon the record
21 made at the hearing before the commission and shall be filed
22 with the court of appeals within thirty days after filing of
23 the ~~[regulation]~~ rule under the State Rules Act. An appeal to
24 the court of appeals under this subsection is perfected by the
25 timely filing of a notice of appeal with the court of appeals

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1 with a copy attached of the [~~regulation~~] rule from which the
2 appeal is taken. The appellant shall certify in [~~his~~] the
3 appellant's notice of appeal that satisfactory arrangements
4 have been made with the commission for preparation of
5 transcripts of the record of the hearing at the expense of the
6 appellant for filing with the court. Upon appeal, the court of
7 appeals shall set aside the [~~regulation~~] rule only if
8 determined to be:

9 (1) arbitrary, capricious or an abuse of
10 discretion;

11 (2) contrary to law; or

12 (3) unsupported by substantial evidence on the
13 entire record as submitted."